IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 14792 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE D.P.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ZARINBIBI W/O NAZIRMOHAMAD NOORMOHAMAD SHAIKH

Versus

COMMISSIONER OF POLICE BARODA CITY

Appearance:

1. Special Civil Application No. 14792 of 2003

MS DR KACHHAVAH for Petitioner No. 1

MR KAMLESH KACHHAVAH for Petitioner No. 1

MS Mita S Panchal AGP for Respondent No. 1-3

RULE SERVED for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE D.P.BUCH

Date of decision: 23/03/2004

ORAL JUDGEMENT

The petitioner above named has preferred this petition under Article 226 of the Constitution of India for appropriate writ, order or direction, for quashing and setting aside an order dated 01/10/03, passed by respondent no.1, for detaining the petitioner u/s.3(2) of the Gujarat Prevention of Anti-Social Activities Act, 1985, (for short, "the said Act") on the ground that the petitioner was involved in five different offences punishable u/s.66(B), 65(A) and 65(E) read with s.81 of the Bombay Prohibition Act, 1949 registered before Sayajiganj Police Station.

2. As per the case of the detaining authority, five offences punishable under the Bombay Prohibition Act, 1949 were registered against the petitioner before Sayajiganj Police Station at C.R.Nos.9/2003, 173/2003, 247/2003, 277/2003 and 312/2003 during the period between 02/01/03 and 02/09/03. It is also the case of the detaining authority that there were two statements of unnamed witnesses involving the present petitioner. That in view of the aforesaid registered and unregistered offences, the petitioner was found to be a "bootlegger" and therefore, with a view to prevent him from continuing his alleged activities, he was required to be detained. Accordingly, an order of detention was passed against the petitioner.

3. The petitioner has challenged the above order of his detention on various counts.

3.1 It has been contended that the representation of the petitioner was not dealt with and decided promptly and that the documents sought for were not supplied by the detaining authority. That the alleged activities could not be treated to be a threat to public order, though it may amount to a threat to law and order situation. That, though the statements of witnesses have been supplied to the petitioner, the names of the deponents have not been conveyed to the petitioner. That, therefore, there is a violation of the principle of natural justice.

3.2 It has also been contended that even if the detaining authority wanted to exercise power of privilege under Section 9(2) of the said Act, it had no material for claiming such a privilege. That, therefore, the impugned order of detention is illegal and deserves to be quashed and set aside. The petitioner has, therefore, prayed that the present petition be allowed, the

detention order may be quashed and the petitioner may be set at liberty.

4. On receipt of the petition, Rule was issued and in response to the service of notice of Rule, Ms.Mita S Panchal learned AGP has appeared on behalf of the respondents. The learned AGP submits affidavit of respondent no.1. It is taken on record. I have heard the learned advocates for the parties and have perused the papers.

5. The learned advocate for the petitioner has contended that as per the detaining authority order, five offences under the Bombay Prohibition Act were registered against the petitioner. However, according to the arguments of the learned advocate for the petitioner, these are stray isolated offences which may amount to a threat to law and order situation, but, may not amount to a threat to public order.

6. The learned AGP has contended that the activities of the petitioner would be a threat to public health and therefore, the petitioner was required to be detained. In support of the said arguments, she has relied upon a decision in the case of Kanuji S. Zala V/s. State of Gujarat reported in 2000 (4) GLR 3256.

7. She has also relied upon a decision in the case of Amanullakhan Kudeatallakhan Pathan V/s. State of Gujarat reported in 2000 (4) GLR 3623. There it was noticed that certain offences were registered against the detenu and the decision of the authority was that the detenu was a "dangerous person" and his activity adversely affected public order.

8. During the course of arguments, a decision of a Division Bench of this Court in order dated 22/08/2000 passed in L.P.A. No.223 / 2000 in S.C.A.No.554 / 2000 was required to be dealt with.

8.1 The learned Judges had an occasion to deal with a decision in the case of Kishor Naginbhai Parmar V/s. State of Gujarat & Ors.(supra) in para 2 of the judgment. The Division Bench also referred to three other decisions : Piyush Kantilal Mehta V/s. Commissioner of Police : AIR 1989 SC 491, Om Prakash V/s. Commissioner of Police : JT 1989 (4) SC 177 and Rashidmiya alias Chhava Ahmedmiya Shaikh V/s. Police Commissioner, Ahmedabad and another : AIR 1989 SC 1703. On a careful

consideration of the above judgments, this Court found that the fact that certain prohibition cases were registered against the petitioner cannot lead the Court to a finding that the petitioner was a bootlegger or was a dangerous person.

8.2 Even the issue of public health was considered by the Division Bench in the aforesaid matter. There it was observed that the litmus test is to find out as to whether it is a case of a breach of public order or a breach of public health and therefore, in order to arrive at the said finding there must be credible material to support the said order.

8.3 It has also been observed that whatever stated by three witnesses with regard to the unregistered offences and with regard to the three incidents referred to in the judgment, it cannot be considered to be the material germane for the purpose of consideration of a threat to public health and public order and therefore, the only material which remains is the registered criminal cases and that itself cannot be said to be a material for the purpose of holding that the appellant's activities had become a threat to public order and public health.

9. The present case is almost similarly situated and here also except the bare statements of a couple of witnesses and registration of a few prohibition offences, there was no other material before the detaining authority for arriving at a conclusion that the petitioner was a "dangerous person" or that he was a "bootlegger".

10. Similar observation was made by this Court in the case of Vinodbhai Kalubhai Koli V/s. State of Gujarat in order dated 12/08/02 passed in S.C.A.No.4925 / 2002.

11. It has also been contended by the learned advocate for the petitioner that the statements of two unnamed witnesses considered by the detaining authority have been supplied to the petitioner, but, the names of the witnesses have not been disclosed. It is her argument that with a view to observe the principle of natural justice, the names of unnamed witnesses ought to have been disclosed to the petitioner. At this stage, the learned AGP has contended that the detaining authority has a power of privilege to keep the names away

from the petitioner in exercise of the powers u/s.9(2) of the said Act. She has, therefore, contended that the petitioner was not entitled to get the names of the said witnesses. It is true that u/s.9(2) of the said Act, the detaining authority has a power of privilege to with hold the names of unnamed witnesses from the notice of the petitioner. At the same time, in order to claim the said privilege, there ought to be some credible material on the basis of which the said power of privilege can be exercised by the said authority. It is true that as per the records, the detaining authority had verified the statements of witnesses referred to above. However, it is not noticed that the detaining authority had further considered from the records that the fear expressed by the said witnesses was correct and genuine. There appears to be no material before the detaining authority to come to a finding that the fear expressed by the witnesses, during the course of their statements, was real and genuine.

12. In order to substantiate the said argument, we may refer to a decision in the case of Kishor Naginbhai Parmar V/s. State of Gujarat & Ors. reported in 2000 (4) GLR 3236. There the detaining authority had claimed power of privilege u/s.9(2) of the said Act. After considering many decisions, this Court in the above matter, came to a conclusion that, it cannot be said that either the grounds of detention or the affidavit-in-reply filed by the detaining authority disclose the grounds and reasons which were considered by the detaining authority for exercising powers u/s.9(2) of the said Act. In that view of the matter, if the names of the witnesses have not been disclosed and if the power of privilege u/s.9(2) of the said Act has been claimed and if there was no material before the detaining authority for coming to a finding about the correctness and genuineness with respect to the fear expressed by the witnesses and if that is not done, the names of the witnesses were certainly required to be supplied to the detenu.

13. In the present case, the names of the witnesses have not been supplied and on the other hand, it is found that the detaining authority had adequate materials with it for exercising powers of privilege u/s.9(2) of the said Act. In the premises, the order of detention cannot be sustained in the eyes of law. So, on the one hand, the alleged bootlegging activities of the petitioner are not found to be a threat to public order or public health and on the other hand, the power of privilege u/s.9(2) of the said Act, cannot be said to have been claimed by proper exercise of power thereunder. In absence of the

above position, the order of detention cannot be sustained in the eyes of law.

14. For the foregoing reasons, this petition is allowed. The impugned order of detention passed by respondent no.1 on 01/10/03 in respect of the petitioner Zarinabibi w/o Nazirmohamad Noormohamad Shaikh, is hereby quashed and set aside. The detenu is ordered to be set at liberty forthwith, if no longer required in any other case. Rule is made absolute. Direct service permitted.

(D. P. Buch, J.)

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